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# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No.

UNITED STATES OF AMERICA, APPELLANT

v.

CLARENCE EWELL

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No.

UNITED STATES OF AMERICA, APPELLANT

v.

RONALD K. DENNIS

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF INDIANA

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The opinions of the district court dismissing the indictments (App., *infra* pp. 11-38; E.R. 28-37; D.R. 22-32)<sup>1</sup> are not reported.

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<sup>1</sup> "E.R." refers to the certified record in the Ewell case; "D.R." refers to the certified record in the Dennis case.

## JURISDICTION

On July 13, 1964, the district court dismissed the Ewell indictment on the ground that the defendant had been denied a speedy trial under the Sixth Amendment (App., *infra*, pp. 11-24; E.R. 28-37). A petition for rehearing was denied on July 30, 1964 (App., *infra*, pp. 24-25; E.R. 38, 51). On July 30, 1964, the district court dismissed the indictment against Dennis on the same ground (App., *infra*, pp. 25-38; D.R. 22-32). Notices of appeal to this Court were filed on August 26, 1964 (E.R. 52-53; D.R. 33-34).<sup>2</sup> This appeal is taken pursuant to 18 U.S.C. 3731 which confers jurisdiction on this Court to review on appeal an order of a district court dismissing an indictment in response to a plea in bar. See *United States v. Provoo*, 350 U.S. 857.

## QUESTION PRESENTED

The sentences of appellees on pleas of guilty were set aside on motions under 28 U.S.C. 2255 because of defects in the indictment, and appellees were promptly reindicted for the same offense. The question presented is whether the district court erred in dismissing the subsequent indictments on the ground that, because of the time each appellee had already served on the sentences set aside under 28 U.S.C. 2255, retrial on new indictments was barred by the Sixth Amendment guarantee of a right to a speedy trial.

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<sup>2</sup> On October 23, the district court extended the time to docket the record to November 26, 1964 (E.R. 56; D.R. 37); on November 25, the time was further extended to December 11, 1964.

## STATEMENT

On December 12, 1962, each of the appellees was arrested for sale of narcotics without the order form required by 26 U.S.C. 4705(a). They pleaded guilty on December 18 and 19, respectively, in the United States District Court for the Southern District of Indiana. Ewell was sentenced as a second offender to imprisonment for ten years and Dennis (after commitment for study under 18 U.S.C. 4208(b)) was sentenced to imprisonment for five years (E.R. 29-31; D.R. 22-25).

On July 17, 1963, the Court of Appeals for the Seventh Circuit, in an unrelated case, held that an indictment under 26 U.S.C. 4705(a) which does not allege the name of the purchaser is so defective as to render a conviction thereon subject to vacation by motion under 28 U.S.C. 2255. *Lauer v. United States*, 320 F. 2d 187.<sup>1</sup>

Each appellee subsequently moved to vacate his conviction on the basis of the *Lauer* decision—Ewell on November 6, 1963, and Dennis on January 28, 1964. The motions were granted on January 13 and April 13, 1964, respectively. On the same days, each appellee was arrested under a new complaint charging

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<sup>1</sup> This ruling has been rejected by every circuit which has had occasion to consider the matter. *Clay v. United States*, 326 F. 2d 196 (C.A. 10), certiorari denied, 377 U.S. 1000; *Jackson v. United States*, 325 F. 2d 477 (C.A. 8); *Taylor v. United States*, 332 F. 2d 918 (C.A. 8); *Dickinson v. United States*, 337 F. 2d 343 (C.A. 6); see also *United States v. Spada*, 331 F. 2d 995 (C.A. 2); *Rivera v. United States*, 318 F. 2d 606 (C.A. 9). In a pending case, the government is now asking the Seventh Circuit to reconsider its position.

the sale of narcotics which had formed the basis of the original conviction (E.R. 31-33; D.R. 25-28).

Two months after arrest an indictment in three counts was returned against each appellee—against Ewell in March 1964, and against Dennis in June 1964. In each case, the three counts were based on the transaction which had formed the basis of the original conviction; count 1 charged, as had the original indictment, sale without an order form under 26 U.S.C. 4705(a); count 2 charged a sale not in the original stamped package, in violation of 26 U.S.C. 4704(a); and count 3 charged dealing in illegally imported narcotics in violation of 21 U.S.C. 174 (E.R. 33-34; D.R. 28-29).

On arraignment, appellee Ewell pleaded not guilty, and the trial court appointed counsel, who filed a motion to dismiss the indictment on the grounds of (1) double jeopardy and (2) denial of a speedy trial (E.R. 34-35, 6-13). On July 13, 1964, the court granted the motion to dismiss on the ground that Ewell had been denied a speedy trial, but denied dismissal on the ground of double jeopardy (E.R. 37). The court noted that Ewell had been confined from December 12, 1962 (the date of his original arrest) without bail; that, despite knowledge of the *Lauer* decision, the government had taken no action either to vacate the judgment or submit the matter to an earlier grand jury; and that although it was not a case of neglect by the government or the appellee, "It is litigation resulting from inconsistencies in the developing law that cries out for relief to the defendant." The court also observed that none of the time

served could be credited on the mandatory sentence which would have to be imposed if appellee were convicted (E.R. 36-37).

The government petitioned for rehearing (E.R. 38-39), arguing that under established principles it was not required to take—indeed, could not have taken—affirmative action solely on the basis of *Lauer* either to vacate the judgment or to reindict appellee. The government further advised the court that upon a plea or finding of guilt, all counts except that under 26 U.S.C. 4704(a) would be dismissed, thus leaving a conviction upon which the minimum mandatory sentence would be only five years for a second offender, in contrast to the ten-year sentence which appellee previously received (E.R. 40-47), so that appellee could receive credit for the time served. On July 30, 1964, the court denied the petition for rehearing (E.R. 51).

Similarly, on July 16, 1964, counsel for Dennis filed a motion to dismiss (D.R. 8-19); and, on July 30, 1964, the district court dismissed that indictment on the ground that appellee Dennis had been denied a speedy trial under the Sixth Amendment (D.R. 22-32).

The government is limiting its appeal to that portion of the order of the district court in each case which dismissed the second count of each indictment, charging a violation of 26 U.S.C. 4704(a). We have done so because this section carries lesser penalties for both a first and second offense, and thus there can be no question of the right of the district court,

in fixing sentence, to take into consideration the time already served by appellees.

**THE QUESTION IS SUBSTANTIAL**

In every case in which a defendant obtains his release from prison by motion under 28 U.S.C. 2255, he will have served some period under a voidable sentence. In this case, neither appellee had served more than two years. The district court has, in effect, held that under these circumstances retrial under a new indictment is barred by the Sixth Amendment which guarantees the right to a speedy trial. The decision is erroneous under established principles; it is contrary to the policies reasserted in *United States v. Tateo*, 377 U.S. 463; and it is important in its implications for review of convictions under 28 U.S.C. 2255, for it opens the door to a claim of immunity in every case in which there has been any significant period between conviction and successful collateral attack.

a. There was no denial of a speedy trial in this case. The period of time ordinarily considered relevant on the issue of a speedy trial is the period from the date of indictment to the date of trial. In this case, the period from reindictment to retrial was, indisputably, not excessive. The permissible period from the commission of the offense to the date of indictment is, in general, governed by the statute of limitations. *Harlow v. United States*, 301 F. 2d 361, 366 (C.A. 5), certiorari denied, 371 U.S. 814. The government reindicted the defendants well within the period permitted by statute.



Delay in the period between arrest and indictment may amount to denial of a speedy trial only if it is purposeful or oppressive or results in serious prejudice to the defendant. Cf. *Petition of Provoo*, 17 F.R.D. 183, 203 (D. Md.), affirmed, 350 U.S. 857. No such considerations are applicable where the delay is solely attributable to the setting aside of a prior timely indictment. Congress has recognized this in specifying that reindictment shall be timely even if accomplished after the normal period of limitations where a timely but defective indictment has been dismissed. 18 U.S.C. 3288, 3289.

In the present case there was no showing of serious prejudice to the defendant; nor was there anything like purposeful delay or oppressive conduct by the government. The *Lauer* decision did not make it incumbent on the government to move to set aside all convictions in the Seventh Circuit based on indictments having similar defects. The government could not waive a defendant's prior jeopardy. The defect in the indictment, even under *Lauer*, was one which could only be relied upon by the defendant, who might prefer to ignore it rather than seek a new trial with the possibility of an increased sentence. The government acted promptly after the indictments were set aside. Indeed, both defendants were reindicted within two years of the commission of the offenses in late 1962. This action would have been timely from the standpoint of the five-year period of limitations (18 U.S.C. 3282) and normal requirements of a speedy trial, even if the delay were not justified by the fact that a prior timely indictment

had been set aside. See *Hoag v. New Jersey*, 356 U.S. 464, 472.

b. Any error that there may have been in the original prosecution did not immunize the appellees from retrial after they had procured the vacation of their convictions. This is established by the authorities discussed above and by the absence of harm to the defendants or oppression by the government. It is confirmed by this Court's decision last term in *United States v. Tateo*, 377 U.S. 463, where, in rejecting the defendant's claim of double jeopardy and accordingly authorizing retrial after a far longer term of imprisonment than was involved here, the Court reasserted the principles applicable to retrial after a conviction has been set aside on collateral attack. They control a claim of denial of a speedy trial as well as a claim of double jeopardy (377 U.S. at 466):

\* \* \* Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the

practice of retrial serves defendants' rights as well as society's interest. \* \* \*

c. The entire system of post-conviction remedies which has developed in the federal and State courts is based on the assumption that one who moves to have a conviction set aside for error may be subject to reindictment and retrial free of error. As this Court's *Tateo* opinion states, neither the cause of justice nor the interests of defendants would be served by transforming either a technical defect in an indictment or a trial error into a grant of immunity, where no oppressive action by the government and no prejudice to the defendant has been shown. This is, however, precisely the result dictated by the court below. The decision below, moreover, results in a discriminatory application of the law, granting immunity to defendants who have bypassed the normal procedures for attacking an indictment and relied upon collateral attack, while allowing retrial of defendants who have made timely attacks on the indictment prior to trial or plea of guilty. As in *Tateo*, it is "incongruous to compel greater relief for one who proceeds collaterally than for one whose rights are vindicated on direct review." 377 U.S. at 466. For these reasons, we believe that the decision below is not only erroneous but detrimental to the proper administration of criminal justice.

## CONCLUSION

These cases raise a substantial question of public importance which warrants resolution by this Court. It is respectfully submitted that probable jurisdiction should be noted and the judgments below reversed.

ARCHIBALD COX,  
*Solicitor General.*

HERBERT J. MILLER, Jr.,  
*Assistant Attorney General.*

BEATRICE ROSENBERG,  
THEODORE GEORGE GILINSKY,  
*Attorneys.*

DECEMBER 1964.

## APPENDIX

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT  
OF INDIANA, INDIANAPOLIS DIVISION

No. IP 64-Cr-33

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE EWELL, DEFENDANT

### ENTRY

This case is before the Court for ruling on defendant's amended motion filed July 7, 1964 to dismiss the indictment in three counts returned in this Court on March 26, 1964. The grounds of the motion are quoted as follows:

1. The defendant has been in jeopardy of conviction of the offense charged therein in the case of *United States of America v. Clarence Ewell* in the District Court for the Southern District of Indiana, Indianapolis Division, Cause Number IP 62-CR-192, terminated December 18, 1962.

2. The defendant has been denied his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States.

The history of the legal proceedings to which the defendant has been subjected for the alleged involvement with narcotics on or about October 31, 1962 in Indianapolis, Indiana, is necessary to reach a conclusion on the two grounds of the motion. The

Court takes judicial notice of the following from its records in the case entitled, *United States of America v. Clarence Ewell*, IP 62-CR-192; *Clarence Ewell v. T. Wade Markley, Warden, United States Penitentiary, Terre Haute, Indiana*, TH 63-C-104; *United States of America v. Clarence Ewell*, IP 64-Cr-33; and *United States of America v. Lauer*, EV 59-Cr-27, (7th Cir. 1961) 287 F. 2d 633; *Lauer v. United States*, (7th Cir. 1963), 320 F. 2d 187:

*December 10, 1962*

The complaint of *United States of America v. Clarence Ewell* was filed charging narcotics violation on or about October 31, 1962 of Title 26, U.S.C., § 4705(a).

*December 12, 1962*

Mr. Ewell was arrested on a warrant based on such complaint of December 10, 1962 and taken before the United States Commissioner the same date and after appropriate proceedings Mr. Ewell was remanded to jail because of his not posting bond in an amount duly fixed by the Commissioner.

*December 14, 1962*

One count of the indictment was returned in the United States District Court, Southern District of Indiana, Indianapolis Division, entitled *United States of America v. Clarence Ewell*, IP 62-Cr-192, which is quoted as follows:

#### INDICTMENT

The Grand Jury charges:

That on or about October 31, 1962, at Indianapolis, in the Indianapolis Division of the Southern District of Indiana, Clarence Ewell, the defendant herein, did knowingly, wilfully

and unlawfully sell a narcotic drug as defined in Title 26, United States Code, Section 4731(a), to-wit: 400 milligrams, more or less, heroin hydrochloride, not in pursuance of a written order of the person to whom said narcotic drug was sold on a form issued in blank for that purpose by The Secretary of the Treasury or his delegate, in violation of Title 26 United States Code, Section 4705(a).

A bond of \$10,000.00 was set by the Court. A praecipe for a warrant for the arrest of Mr. Ewell to answer the charge in this indictment was presented to the Clerk of this Court.

*December 17, 1962*

The Clerk issued a warrant to the United States Marshal who duly served such warrant on Mr. Ewell and placed him in custody.

*December 18, 1962*

The following proceedings were had in open Court:

Comes now the attorney for the government, and the defendant appears in person and without counsel. The Court advises the defendant that he has the right to have an attorney and if financially unable to hire one, the Court will appoint counsel to represent him without charge, and the defendant indicating that he wants an attorney, the Court appoints David B. Lockton, a member of the bar of this Court, to represent him.

The Court explains to the defendant the nature of the charge and the rights afforded him under the Constitution and after being fully advised, the defendant having received a copy of the Indictment and having waived the reading of same, now states that he thoroughly understands the nature of the charge against him, and being arraigned upon the Indictment,



for plea, says that he is guilty as charged. No presentence investigation ordered.

After the defendant entered such plea of guilty to the indictment of December 14, 1962, the government then filed in open Court in the presence of defendant and his counsel the following charge:

MEMORANDUM OF PRIOR NARCOTICS CONVICTION

Comes now the United States of America by Richard P. Stein, United States Attorney for the Southern District of Indiana, and David W. Mernitz, Assistant United States Attorney, and pursuant to 26 U.S.C. 7237(c)(2) respectfully shows to the Court that Clarence Ewell, the defendant herein, was convicted on April 5, 1956 on his plea of guilty to the offense of purchase and sale of a narcotic drug not in the original stamped package and not having the tax-paid stamp affixed thereto in violation of Title 26, United States Code, Section 4704(a), which offense is counted as a prior offense under 26 U.S.C., Section 7267(c)(1) for purposes of sentencing under 26 U.S.C. 7237(b).

Whereupon, the Court rendered judgment which is quoted as follows:

On this 18th day of December, 1962 came the attorney for the government and the defendant appeared in person and by David B. Lockton, his court appointed attorney.

It is adjudged that the defendant has been convicted upon his plea of Guilty of the offense of unlawfully selling a narcotic drug, to-wit: 400 milligrams, more or less, heroin hydrochloride, without a written order on a form issued for that purpose by the Secretary of the Treasury, on or about October 31, 1962, at Indianapolis, Indiana, in violation of Title 26 U.S.C., Section 4705(a), as charged in the Indictment, and upon his plea of guilty to the Memorandum



of Prior Narcotics Conviction filed by the government this date, in that the defendant was convicted on April 5, 1956, on his plea of guilty to the offense of selling a narcotic drug in violation of Title 26 U.S.C., Section 4704(a), which offense is counted as a prior offense under 26 U.S.C., Section 7267(c)(1) for purpose of sentencing under 26 U.S.C. 7237(b). And the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) years.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CALE J. HOLDER,  
*United States District Judge.*

*July 17, 1963*

Seventh Circuit Court of Appeals published its opinion in the case of *Lauer v. United States of America*, 320 F. 2d 187 in which it held that an indictment charging an offense under Title 26 U.S.C. § 4705(a) does not state an offense unless it named the buyer of narcotics from the defendant-seller.

*September 6, 1963*

Defendant requested a copy of the indictment of December 14, 1962.

*September 27, 1963*

A copy of the indictment of December 14, 1962 was mailed by the Clerk to Mr. Ewell in the United States Penitentiary, Terre Haute, Indiana.

*November 6, 1963*

The case of *Clarence Ewell v. T. Wade Markley*, Warden, United States Penitentiary, Terre Haute, Indiana, TH 63-C-104, was filed.

*January 13, 1964*

Judgment in accordance with the following quoted findings of fact and conclusions of law was entered in TH 63-C-104:

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial on the issues of the petitioner's "Motion To Vacate And Set Aside Judgment And Sentence" filed November 6, 1963; and the respondent's brief in opposition filed December 30, 1963 and supplemental brief filed December 31, 1963.

#### FINDINGS OF FACT

1. The petitioner is now and was at the time of instituting this action an inmate of the United States Penitentiary at Terre Haute, Indiana, and in the custody of the respondent.

2. The petitioner is in such custody by reason of a sentence of this Court on December 18, 1962 for the term of ten years in Cause Number IP 62-Cr-192 for the violation of Title 26 U.S.C. Section 4705(a) and a second offender pursuant to Title 26 U.S.C. Section 7237(c)(2).

3. Such sentence was rendered on an indictment charging petitioner with a violation of

Title 26 U.S.C. Section 4705(a) after a plea of guilty. The indictment failed to set forth the name of the person to whom the alleged unlawful sale of narcotics was made and did not contain any allegations which would properly excuse or overcome such omission.

#### CONCLUSIONS OF LAW

1. The indictment failed to charge an offense of any kind. *Lauer v. United States*, (7th Cir. 1963), 320 F. 2d 187.

2. The sentence of this Court on the plea of guilty to such indictment is a nullity.

3. The Court was without jurisdiction to enter such judgment and sentence.

4. The petitioner's Motion is sustained and this Court's judgment and sentence of December 18, 1962 in *United States of America v. Clarence Ewell*, Cause Number IP 62-Cr-192 is vacated and set aside on authority of *Lauer v. United States*, (7th Cir. 1963), 320 F. 2d 187. The respondent is directed to release Clarence Ewell from custody previously authorized by such judgment of December 18, 1962 in such cause.

The Clerk will enter judgment in accordance with these findings and conclusions.

Dated this 13th day of January, 1964.

CALE J. HOLDER,

Judge, *United States District Court,*  
*Southern District of Indiana.*

*January 13, 1964*

The complaint of *United States of America v. Clarence Ewell*, Commissioner's Docket No. 2, Case No. 101, filed in the Indianapolis Division, United States District Court, Southern District of Indiana, charging narcotics violations on or about October 31, 1962 of Title 26 U.S.C. §§ 4704(a) and 4705(a).

*January 16, 1964*

Mr. Ewell upon release from the United States Penitentiary was taken before the United States Commissioner in the Terre Haute Division of this Court, and after appropriate proceedings Mr. Ewell was temporarily remanded to jail because of his not posting bond in an amount duly fixed by the Commissioner.

*January 27, 1964*

Mr. Ewell was taken before the United States Commissioner in the Indianapolis Division of this Court, and after appropriate proceedings Mr. Ewell was finally remanded to jail because of his not posting bond in an amount duly fixed by the Commissioner.

*March 26, 1964*

A three-count indictment was returned in the United States District Court, Southern District of Indiana, Indianapolis Division, entitled, *United States of America v. Clarence Ewell*, IP 64-Cr-33, which is quoted as follows:

INDICTMENT

Count I-26 U.S.C. 4705(a)

The Grand Jury charges:

That on or about October 31, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Clarence Ewell, did unlawfully, willfully, and knowingly sell 400 milligrams, more or less, of heroin hydrochloride, a narcotic drug, to Cornelius C. Cooper, not in pursuance of a written order from the said Cornelius C. Cooper on a form issued by the Secretary of the Treasury of the United States or his au-

thorized delegate; in violation of Title 26, United States Code, Section 4705(a), as amended by the Narcotic Control Act of 1956.

Count II-26 U.S.C. 4704(a)

The Grand Jury further charges:

That on or about October 31, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Clarence Ewell, did unlawfully sell to Cornelius C. Cooper, 400 milligrams, more or less, of heroin hydrochloride, a narcotic drug, not in the original stamped package nor from the original stamped package; in violation of Title 26, United States Code, Section 4704(a), as amended by the Narcotic Control Act of 1956.

COUNT III-21 U.S.C. 174

The Grand Jury further charges:

That on or about October 31, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Clarence Ewell, did receive, conceal, facilitate the transportation and concealment of, and sell to Cornelius C. Cooper, 400 milligrams, more or less, of heroin hydrochloride, a narcotic drug, which had been previously imported into the United States contrary to law, knowing the same to have been so unlawfully imported; in violation of Title 21, United States Code, Section 174, as amended by the Narcotic Control Act of 1956.

A bond was fixed by the Court in the sum of \$10,000.00.

*March 27, 1964*

A praecipe for a warrant for the arrest of Mr. Ewell to answer the charge in this indictment was presented to the Clerk of this Court.

*March 30, 1964*

The Clerk issued a warrant to the United States Marshal who duly served such on Mr. Ewell and placed him in custody.

*April 23, 1964*

The following proceedings, as quoted from the entry of this date, were had in open Court:

Comes now the attorney for the government and the defendant appeared in person and without counsel. The Court advises the defendant that he has the right to have an attorney and if financially unable to hire one, the Court will appoint counsel to represent him without charge, and the defendant indicating that he wants an attorney, the Court appoints David B. Lockton, a member of the bar of this Court, to represent him.

After having conferred with counsel, the Court explains to the defendant the nature of the charge and the rights afforded him under the Constitution and after being fully advised, the defendant having heretofore received a copy of the indictment and the same having been read to him in open court by the attorney for the government, now states that he thoroughly understands the nature of the charge and being arraigned upon the indictment, for plea, says that he is not guilty as charged in all three counts.

The defendant's oral motion for time to file any pleadings addressed to the indictment is granted to and including May 18, 1964; the

government to file its answer brief fifteen days thereafter, and the defendant to file his reply brief ten days thereafter.

*May 14, 1964*

Defendant's counsel filed a motion for extension of time of ten days from May 18, 1964 within which to file motions addressed to the indictment. The request was consented to by the United States District Attorney.

*May 18, 1964*

The Court granted the request of the defendant of May 14, 1964 for a ten-day extension of time.

*May 28, 1964*

Defendant filed a motion to dismiss the indictment of March 26, 1964. Defendant also filed a brief in support thereof.

*June 9, 1964*

The United States District Attorney requested an extension of time to June 27, 1964 to file an answer brief to the brief of defendant filed May 28, 1964.

*June 12, 1964*

The Court granted the request of the government of June 9, 1964, and time to file the answer brief was extended to June 27, 1964.

*June 24, 1964*

The United States of America filed its answer brief.

*July 6, 1964*

The defendant filed his reply brief.



*July 7, 1964*

The defendant filed an amended motion to dismiss the indictment of March 26, 1964. Defendant filed a brief in support thereof.

Mr. Ewell has been in continuous confinement from the date of his first arrest on December 12, 1962 to the date of this entry and will remain in such confinement until the trial thereof in September 1964 depending upon the action taken on this motion and appeals therefrom. This is a total of one year and approaching seven months. During the period of Mr. Ewell's confinement from December 18, 1962 to January 13, 1964, there was no opportunity for bail as the procedural laws of the United States made no provision therefor even though he was during this time illegally held on a judgment based on an indictment which did not charge a crime. During the period from December 10, 1962 to December 18, 1962, he was confined because of being unable to post the required bail of \$10,000.00 to answer to a complaint and indictment which did not charge a crime.

Prior to the July 17, 1963 decision of *Lauer v. United States of America*, 320 F. 2d 187, the defendant and the United States Attorney believed that an indictment in the language of the statute defining the offense was the substantive and procedural law of the land. The government intentionally avoided using the prosecuting witnesses' names in all narcotic indictments. After July 17, 1963 and the Lauer decision, Mr. Ewell was faced with a confusing state of jurisprudence as were a number of defendants serving lengthy terms under similar indictments. Mr. Ewell could serve out his term of years based on a void judgment, or challenge the judgment immediately, or challenge the judgment after the statute of limitations had expired, or challenge the judgment



after serving out his full term of the void judgment. In view of Title 18 U.S.C.A. §§ 3288 and 3289, there was no choice to Mr. Ewell but to challenge the judgment immediately.

The government had full knowledge of the effect of the July 17, 1963 Lauer decision on the judgment and took no action whatever in expunging or vacating such Ewell judgment, nor in submitting the matter to the August and December 1963 terms of the Grand Jury and waited until defendant successfully took action to vacate the judgment.

The government then, for some reason unknown of record other than the expressed concern of the prospective liberation of a number of similarly convicted narcotic felons, caused the Grand Jury in March 1964 to reindict Mr. Ewell for three narcotic offenses allegedly occurring on the same date growing out of the same transaction whereas the first indictment was for one narcotic offense allegedly occurring on the same date and apparently the same transaction referred to in the three offenses in the three count indictment.

This is not a case for charges of neglect against the government, or the defendant, Mr. Ewell. It is litigation resulting from inconsistencies in the developing law that cries out for relief to the defendant, Mr. Ewell. Mr. Ewell was not a belligerent offender. He pleaded guilty within four days of the indictment to get his jail term over. Mr. Ewell has served bailable and unbailable time in County Jails and Federal Penitentiaries since December 12, 1962, none of which time served can or will be credited to the lengthy mandatory sentence if defendant is convicted. Title 26 U.S.C.A. § 7237 (b) (c) (d) and Title 18 U.S.C.A. § 3568. If he is acquitted, he will already have served penitentiary time when there was no legal commitment.

The rights of Mr. Ewell under the Sixth Amendment of the United States Constitution quoted in part as follows has been violated by the combined events recited herein:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial \* \* \*, and to be informed of the nature and cause of the accusation; \* \* \*."

The Court now Grants the amended motion to dismiss the indictment as based on ground two and Denies the motion as based on ground one. The indictment consisting of three counts returned March 26, 1964 is dismissed and the United States Marshal is Ordered to release the defendant forthwith.

Dated this 13th day of July, 1964.

Cale J. Holder,  
CALE J. HOLDER,  
*Judge, United States District Court,  
Southern District of Indiana.*

United States District Court, Southern District of  
Indiana, Indianapolis Division

No. IP 64-CR-33

UNITED STATES OF AMERICA

v.

CLARENCE EWELL

ENTRY FOR JULY 30, 1964

This cause comes before the Court upon the Government's petition for a rehearing and request for oral argument on the defendant's motion to dismiss the Indictment as amended on July 7, 1964, which motion was granted by this Court on July 13, 1964, together with the defendant's brief in reply to the Government's petition for a rehearing.

The Court having heard oral argument and being duly advised in the premises, the Government's petition for rehearing is denied on the grounds that there were no erroneous assumption of facts. The Court after a review of the authorities concludes that its entry of July 13, 1964 correctly states the law applicable to this case.

CALE J. HOLDER,  
*United States District Judge.*

United States District Court, Southern District of  
Indiana, Indianapolis Division

No. IP 64-Cr-84

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

RONALD K. DENNIS, DEFENDANT

ENTRY

This case is before the Court for ruling on defendant's motion filed July 16, 1964 to dismiss the indictment in three counts returned in this Court on June 15, 1964. The grounds of the motion are quoted as follows:

1. The defendant has been denied his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States.

2. The defendant has previously been placed in jeopardy for the offenses charged in the indictment herein in the case of *United States of America v. Ronald K. Dennis*, IP 62-Cr-191, District Court for the Southern District of Indiana, Indianapolis Division.

The history of the legal proceedings to which the defendant has been subjected for the alleged involve-

ment with narcotics on or about September 24, 1962 in Indianapolis, Indiana, is necessary to reach a conclusion on the two grounds of the motion. The Court takes judicial notice of the following from its records in the cases entitled, *United States of America v. Ronald K. Dennis*, IP 62-Cr-191; *Ronald K. Dennis v. United States of America*, TH 64-C-6; *United States of America v. Ronald K. Dennis*, IP 64-Cr-33; and *United States of America v. Lauer*, IP 59-Cr-27, (7th Cir. 1961) 287 F. 2d 633; *Lauer v. United States*, (7th Cir. 1963), 320 F. 2d 187:

*December 10, 1962*

The complaint of the *United States of America v. Ronald K. Dennis* was filed charging a narcotics violation on or about September 24, 1962, of Title 28, U.S.C. § 4705(a).

*December 12, 1962*

The defendant was arrested on a warrant based on such complaint of December 10, 1962, and taken before the United States Commissioner on the same date and after appropriate proceedings was remanded to jail because of his not posting bond in an amount duly fixed by the Commissioner.

*December 14, 1962*

One count of the indictment was returned in the United States District Court, Southern District of Indiana, Indianapolis Division, entitled "*United States of America v. Ronald K. Dennis*, IP 62-Cr-191," which is quoted as follows:

## INDICTMENT

The Grand Jury charges:

That on or about September 24, 1962, at Indianapolis, in the Indianapolis Division of the Southern District of Indiana, Ronald K. Dennis, the defendant herein, did knowingly, wilfully and unlawfully sell a narcotic drug as defined in Title 26, United States Code, Section 4731(a), to-wit: 450 milligrams, more or less, heroin hydrochloride, not in pursuance of a written order of the person to whom said narcotic drug was sold on a form issued in blank for that purpose by The Secretary of the Treasury or his delegate, in violation of Title 26 of United States Code, Section 4705(a).

A bond of \$10,000 was set by the Court. Praecipe for a warrant for the arrest of the defendant to answer the charge in this indictment was presented to the Clerk of this Court.

*December 19, 1962*

The Clerk issued a warrant to the United States Marshall who duly charged such warrant on the defendant and placed him in custody.

*December 19, 1962*

The following proceedings were had in open Court:

Comes now the attorney for the Government, and the defendant appears in person and without counsel. The Court advises the defendant that he has the right to have an attorney and if financially unable to hire one, the Court will appoint counsel to represent him without charge, and the defendant indicating that he does not want an attorney, the defendant executes and files a written waiver of counsel.

The Court explains to the defendant the na-

ture of the charge and the rights awarded him under the Constitution and after being fully advised, the defendant having received a copy of the indictment and the same having been read to him in open court by the attorney for the Government, now states that he thoroughly understands the nature of the charge against him, and being arraigned upon the indictment, for plea, says that he is guilty as charged. No pre-sentence investigation is directed by the Court.

Whereupon, the Court rendered judgment which is quoted as follows:

On this 19th day of December, 1962, came the attorney for the Government and the defendant appeared in person and without counsel, having on this date waived counsel. No pre-sentence investigation having been directed by the Court,

It is adjudged that the defendant has been convicted upon his plea of Guilty of the offence of, on or about September 24, 1962, knowingly, wilfully and unlawfully selling a narcotic drug, not in pursuance of a written order of the person to whom said narcotic drug was sold on a form issued in blank for that purpose by the Secretary of State, in violation of Title 26 U.S.C. Section 4705(a), as charged in the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative, for imprisonment for a period of Twenty (20) years, and for a study as described in 18 U.S.C. 4208(c), the results of such study to be furnished this Court within three (3) months,

whereupon the sentence of imprisonment shall be subject to modification in accordance with 18 U.S.C. 4208(b).

It is ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer, and that the copy of the Judgment serve as the commitment of the defendant.

(S) WILLIAM E. STECKLER,  
*United States District Judge.*

*April 2, 1963*

The Court entered the following order modifying judgment:

On this 2nd day of April, 1963, came the attorney for the Government and the defendant appeared in person and without counsel, having heretofore waived counsel. The Court now vacates defendant's waiver of counsel, and appoints George Rich, a member of the bar of this Court, to represent him.

The defendant having been convicted upon his plea of guilty of the offense of, on or about September 24, 1962, knowingly, wilfully and unlawfully selling a narcotic drug, not in pursuance of a written order of the person to whom said narcotic drug was sold on a form issued in blank for that purpose by the Secretary of State, in violation of Title 26 U.S.C. Section 4705(a), as charged in the Indictment, and the defendant having on December 19, 1962, been committed to the custody of the Attorney General pursuant to Title 18 U.S.C. 4208(b) for imprisonment for a period of twenty (20) years and for a study as described in 18 U.S.C. 4208 (c), and the Court having now received and considered the report of such study, and following the recommendations of the Bureau of Prisons,

It is ordered and adjudged that the period of imprisonment be reduced to Five (5) years.



It is ordered that the Clerk deliver two certified copies of this Order Modifying Judgment to the United States Marshal or other qualified officer.

(S) WILLIAM E. STECKLER,  
*United States District Judge.*

*July 17, 1963*

The Seventh Circuit Court of Appeals published its opinion in the case of *Lauer v. United States of America*, 320 F. 2d 187, in which it held that an indictment charging an offense of Title 26 U.S.C. § 4705(a) does not state an offense unless it names the buyer of the narcotics from the defendant-seller.

*October, 1963*

Defendant requested the Court to appoint counsel to represent him.

*November 6, 1963*

The Court denied defendant's request for the appointment of counsel.

*November 12, 1963*

The defendant again requested the Court to appoint counsel to represent him indicating that he believed that the *Lauer* case entitled him to have his judgment and sentence vacated and set aside.

*November 22, 1963*

The Court again refused to appoint counsel to represent the defendant.



*January 28, 1964*

The case of *Ronald K. Dennis v. United States of America*, TH 64-C-6, seeks to have the judgment and conviction vacated and set aside pursuant to Title 28, U.S.C. § 2255 was filed.

*January 29, 1964*

The Court entered its order appointing Donald R. Metz to represent the defendant.

*April 13, 1964*

The Court entered the following Findings of Fact, Conclusions of Law and Judgment:

This cause came on for hearing before the Court upon the petitioner's Motion for Relief under Section 2255, Title 28 U.S.C.A. filed January 28, 1964; the petitioner's Supplemental Motion and Brief filed April 8, 1964; and the respondent's Brief in Opposition filed April 9, 1964. Based upon the motion and briefs submitted, the petitioner's contention is that the indictment upon which he was sentenced and convicted was so defective on its face as to be insufficient to authorize the Judgment of Conviction, since the indictment and record failed to disclose the name of the purchaser to whom he was alleged to have sold the narcotics and he would, therefore, be unable to plead the Judgment as a bar in any subsequent prosecution for the same offense. In response to such assertion, the respondent claims that there is nothing in the record to indicate that the petitioner was prejudiced in any way by virtue of the indictment and record omitting the name of the purchaser and the indictment was sufficient under the general principles of law by which it must be tested.

The parties having stipulated and agreed that the record in Cause No. IP-62-Cr-191 be

admitted and read into evidence, and the Court having read and examined the briefs of both parties and having heard the arguments of counsel, and being duly advised in the premises, does submit its:

#### FINDINGS OF FACT

1. The petitioner is now and was at the time of instituting this action an inmate of the United States Penitentiary at Terre Haute, Indiana, and in the custody of the respondent.

2. The petitioner is in such custody by reason of a Judgment and Commitment Order entered by this Court on December 19, 1962, and modified on April 2, 1963, in Cause No. IP 62-Cr-191, wherein the petitioner received five years for violating Title 26, U.S.C., Section 4705(a).

3. Such Judgment and Commitment Order was rendered on an Indictment charging petitioner with a violation of Title 26, U.S.C., Section 4705(a) after a plea of guilty. The Indictment failed to set forth the name of the person to whom the alleged unlawful sale of narcotics was made and did not contain any allegations which would properly excuse or overcome such omission.

4. The record does not disclose the name of the purchaser to whom the alleged unlawful sale of narcotics was made.

5. The case of *Clay v. United States*, 326 F. 2d 196 (10th Cir. 1963), relied upon by the respondent, is distinguishable from the case at bar for the reason that in *Clay* the name of the purchaser was identified in the record.

Having fully considered the evidence and arguments of counsel, and based upon the foregoing findings of fact, the Court files the following:

#### CONCLUSIONS OF LAW

1. By reason of the omission of the name of the alleged purchaser and the lack of any

allegation properly executed for overcoming such omission and, on the authority of *Lauer v. United States*, 320 F. 2d 187 (7th Cir. 1963), the Indictment upon which the petitioner entered a plea of guilty was so defective on its face that it failed to charge an offense of any kind, and the Court was without jurisdiction to enter such judgment and sentence.

2. In view of the Indictment and the record failing to disclose the name of the purchaser to whom the petitioner was alleged to have sold the narcotics, the petitioner is unable to plead the judgment as a bar in any subsequent prosecution for the same offense.

3. Petitioner's Motion for Relief under Title 28, U.S.C. Section 2255, should be granted. The Judgment and Commitment Order entered on December 19, 1962, as modified on April 2, 1963, in *United States of America v. Ronald K. Dennis*, Cause No. IP 62-Cr-191, should be vacated and set aside.

#### JUDGMENT

It is ordered, adjudged and decreed, that the Judgment and Commitment heretofore entered in *United States of America v. Ronald K. Dennis*, Cause No. IP 62-Cr-191, should be and hereby is vacated and set aside. It is further ordered that petitioner, Ronald K. Dennis, by and hereby is immediately released and discharged from further imprisonment or liability under said judgment and commitment.

Dated: April 13, 1964.

(S) WILLIAM E. STECKLER,  
Judge, *United States District Court*.

April 10, 1964

The complaint of *United States of America v. Ronald K. Dennis*, Commissioner's Docket No. 3, Case No. 358, was filed in the Indianapolis Division, United States District Court, Southern District of

Indiana, charging narcotics violation on or about September 24, 1962, under Title 26, U.S.C. §§ 4704(a) and 4705(a).

*April 13, 1964*

The defendant was arrested on a warrant based upon such complaint of April 10, 1964.

*April, 1964*

The defendant was taken before the United States Commissioner in the Indianapolis Division of this Court and after appropriate proceedings in which Mr. Donald R. Metz was appointed as counsel to represent Mr. Dennis, the defendant was remanded to jail because of his not posting bond in the amount duly fixed by the Commissioner.

*June 15, 1964*

A three-count indictment was returned in the United States District Court, Southern District of Indiana, charging narcotics violation on or about September 24, 1962, of Title 26, U.S.C. §§ 4704(a) and 4705(a), entitled: "*United States of America v. Ronald K. Dennis, IP 64-Cr-84,*" which is quoted as follows:

#### INDICTMENT

Count I—26 U.S.C. 4705(a)

The Grand Jury charges:

That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Ronald K. Dennis, did unlawfully, wilfully and knowingly sell 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, to Cornelius C. Cooper, not in pursuance of a written order from the said Cor-

nelius C. Cooper on a form issued by the Secretary of the Treasury of the United States or his authorized delegate, in violation of Title 26, United States Code, Section 4705(a), as amended by the Narcotics Control Act of 1956.

Count II—26 U.S.C. 4704(a)

The Grand Jury further charges:

That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Ronald K. Dennis, did unlawfully sell to Cornelius C. Cooper, 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, not in the original stamped package nor from the original stamped package; in violation of Title 26, United States Code, Section 4704(a), as amended by the Narcotics Control Act of 1956.

Count III—21 U.S.C. 174

That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Ronald K. Dennis, did receive, conceal, facilitate, the transportation and concealment of, and sell to Cornelius C. Cooper, 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, which had been previously imported into the United States contrary to law, knowing the same had been unlawfully imported, in violation of Title 21, United States Code, Section 174, as amended by the Narcotics Control Act of 1956.

*June 16, 1964*

A praecipe for a warrant for the arrest of the defendant to answer the charge in this indictment was presented to the Clerk of the Court.

*June 16, 1964*

The Court issued a warrant to the United States Marshal who duly served such on the defendant and placed him in custody.

The defendant remains in custody awaiting arraignment on the indictment of June 15, 1964.

*July 16, 1964*

Defendant filed a motion to dismiss the indictment of June 15, 1964. Defendant also filed a brief in support thereof.

*July 23, 1964*

The United States of America filed its answer in opposition to defendant's motion to dismiss the indictment.

Mr. Dennis has been in continuous confinement from the date of his first arrest on December 12, 1962 to the date of this entry and will remain in such confinement until the trial thereof in September 1964 depending upon the action taken on this motion and appeals therefrom. This is a total of one year and approaching seven months. During the period of Mr. Dennis' confinement from December 19, 1962 to April 13, 1964, there was no opportunity for bail as the procedural laws of the United States made no provision therefor even though he was during this time illegally held on a judgment based on an indictment which did not charge a crime. During the period from December 10, 1962 to December 19, 1962, he was confined because of being unable to post the required bail of \$10,000.00 to answer to a complaint and indictment which did not charge a crime.

Prior to the July 17, 1963 decision of *Lauer v. United States of America*, 320 F. 2d 187, the defendant and the United States Attorney believed that an

indictment in the language of the statute defining the offense was the substantive and procedural law of the land. The government intentionally avoided using the prosecuting witnesses' names in all narcotic indictments. After July 17, 1963 and the *Lauer* decision, Mr. Dennis was faced with a confusing state of jurisprudence as were a number of defendants serving lengthy terms under similar indictments. Mr. Dennis could serve out his term of years based on a void judgment, or challenge the judgment immediately, or challenge the judgment after the statute of limitations had expired, or challenge the judgment after serving out his full term of the void judgment. In view of Title 18 U.S.C.A. §§ 3288 and 3289, there was no choice to Mr. Dennis but to challenge the judgment immediately.

The government had full knowledge of the effect of the July 17, 1963 *Lauer* decision on the judgment and took no action whatever in expunging or vacating such *Dennis* judgment, nor in submitting the matter to the August and December 1963 terms of the Grand Jury and waited until defendant successfully took action to vacate the judgment.

The government then, for some reason unknown of record other than the expressed concern of the prospective liberation of a number of similarly convicted narcotic felons, caused the Grand Jury in June 1964 to reindict Mr. Dennis for three narcotic offenses allegedly occurring on the same date growing out of the same transaction whereas the first indictment was for one narcotic offense allegedly occurring on the same date and apparently the same transaction referred to in the three offenses in the three count indictment.

This is not a case for charges of neglect against the government, or the defendant, Mr. Dennis. It is litigation resulting from inconsistencies in the develop-



ing law that cries out for relief to the defendant, Mr. Dennis. Mr. Dennis was not a belligerent offender. He pleaded guilty within five days of the indictment to get his jail term over. Mr. Dennis has served bailable and unailable time in County Jails and Federal Penitentiaries since December 12, 1962, none of which time served can or will be credited to the lengthy mandatory sentence if defendant is convicted. Title 26 U.S.C.A. § 7237 (b),(d), and Title 18 U.S.C.A. § 3568. If he is acquitted, he will already have served penitentiary time when there was no legal commitment.

The rights of Mr. Dennis under the Sixth Amendment of the United States Constitution quoted in part as follows has been violated by the combined events recited herein.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial \* \* \*, and to be informed of the nature and cause of the accusation; \* \* \*

The Court now grants the motion to dismiss the indictment as based on ground one and denies the motion as based on ground two. The indictment consisting of three counts returned June 15, 1964 is dismissed and the United States Marshal is ordered to release the defendant forthwith.

Dated this 30th day of July, 1964.

CALE J. HOLDER,  
*Judge, United States District Court,  
Southern District of Indiana.*